

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALYSON HERFERT, TALANA WILEY,)
SHANNON GORDNER, KATHRYN DE)
PEUTER, BECKY KUHL, ALANNA)
WASKO, and DENIZ ZOELLER, on behalf of)
themselves and all others similarly situated,)
Plaintiffs,)
v.)
CRAYOLA LLC,)
Defendant.)

No. 2:11-cv-1301-JCC

JOINT MOTION TO REQUIRE
ATTORNEY CHRISTOPHER BANDAS
AND OBJECTOR AMBER PEDERSON
TO POST APPEAL BOND, AND
SEEKING ANY OTHER APPROPRIATE
RELIEF TO PROTECT THE CLASS

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR:
JULY 6, 2012

I. INTRODUCTION

Plaintiffs and Defendant jointly request an order requiring attorney Christopher Bandas and his client, Objector Amber Pederson, to post an appeal bond under Federal Rule of Appellate Procedure 7. This bond will ensure the payment of costs incurred to defend against a meritless appeal that vexatiously attempts to jeopardize the fair, reasonable, and adequate Settlement—a Settlement that Class Members overwhelmingly support and that is currently underway.

1 While Objector Pederson's objection was filed *pro se*, the affidavit accompanying the
 2 objection was notarized by Margot Valdez, the legal secretary of Mr. Bandas. (*See Decl.* of
 3 Lynn Lincoln Sarko at ¶¶ 2-3, Ex. 1 ("Sarko Decl."); *see also* Dkt. No. 47.) Mr. Bandas has told
 4 Class Counsel that he now represents Objector Pederson. Mr. Bandas is an attorney with a
 5 reputation for counterproductive appearances in class action settlements across the country. As
 6 detailed below, Mr. Bandas has been ordered by district courts to post appeal bonds up to
 7 \$500,000 and has been sanctioned for failing to post the bonds. In at least one of his frivolous
 8 appeals, Mr. Bandas' client was allegedly *pro se*—as here—but suddenly became represented by
 9 Mr. Bandas on appeal. The Court should order this vexatious counsel and his client to post an
 10 appeal bond. The parties further suggest that a hearing on this motion will help the Court assess
 11 its merit and respectfully request the motion be set on the Court's oral argument calendar.
 12

13 **II. THE COURT SHOULD REQUIRE THE OBJECTOR TO POST A BOND**

14 Federal Rule of Appellate Procedure 7 provides that, "In a civil case, the district court
 15 may require an appellant to file a bond or provide other security in any form and amount
 16 necessary to ensure payment of costs on appeal." Fed. R. App. P. 7. The Advisory Committee
 17 Notes to the Rule indicate that it leaves "the question of the need for a bond for costs and its
 18 amount in the discretion of the court." Fed. R. App. P. 7, Adv. Comm. Notes.
 19

20 To determine whether an appeal bond is appropriate, courts generally consider four
 21 factors: (1) the merits of the appeal; (2) whether the appellant has shown any bad faith or
 22 vexatious conduct; (3) the appellants' financial ability to post a bond; and (4) the risk that the
 23 appellant will not pay the appellees' costs of an unsuccessful appeal. *In re Wells Fargo Loan*
 24 *Processor Overtime Pay Litig.*, No. 07-1841, 2011 WL 3352460, at *10 (N.D. Cal. Aug. 2,
 25 2011); *Fleury v. Richemont N. Am. Inc.*, No. 05-4525, 2008 WL 4680033, at *6 (N.D. Cal. Oct.
 26

21, 2008). Each of these factors weigh heavily in favor of requiring Mr. Bandas and Objector Pederson to post a bond.

A. The appeal is meritless.

On appeal, Objector Pederson will be limited to the issues that she raised in her objection, *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995) (quotation and citation omitted), and she will be required to show that this Court abused its discretion when it granted final approval of the Settlement. *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). Objector Pederson has no reasonable expectation of prevailing under these standards, as this Court's approval of the settlement was amply supported by the record and Objector Pederson's objections are meritless. Indeed, the reasonableness and adequacy of the Settlement is demonstrated by the fact that, even though millions of 2011 Washable Colored Bubbles were sold, only *one* individual objected to this Settlement—Objector Pederson and her attorney, professional objector Chris Bandas.

The objection claims that (1) the injunctive relief is “illusory”; (2) the relief is too modest and there is no guaranteed minimum payout or guaranteed relief; (3) Claim Members could have received compensation from Crayola without the settlement; (4) the Claims Process lacks clear rules; and (5) the attorneys' fees are unreasonable. (*See* Notice of Objection to Settlement filed by Claimant Amber Pederson, Dkt. No. 47.) Plaintiffs and Defendant have already demonstrated the insurmountable deficiencies in Objector Pederson's objection. (*See, e.g.*, Reply Brief in Support of Final Approval of Settlement and Response to Objection, Dkt. No. 48.)

First, the Settlement's relief is not illusory. (*Id.* at 3.) The Settlement requires that Crayola take specific actions, including discontinuing the production of the 2011 Washable Colored Bubbles as originally formulated and labeled, and re-labeling the product for 2012. (*Id.*)

1 Second, the Settlement also provides guaranteed relief to Class Members that cannot be
2 characterized as “modest.” For example, Class Members are eligible to receive the *full* cash
3 value of the product plus shipping, handling, and taxes. (*Id.* at 4.) Even Class Members who do
4 not have proof of purchase may still claim Crayola vouchers up to \$12, a generous amount
5 considering the lack of evidence of purchase. (*Id.*) Class Members may also be reimbursed for
6 cleaning product costs and out-of-pocket costs to remediate damage to real or personal property.
7 (*Id.*)

9 Third, even if portions of the relief mandated by this Settlement were available at
10 Defendant’s discretion before the settlement, under the Settlement, Defendant is now legally
11 obligated to provide the relief contained in the Settlement. In addition, the Settlement provides
12 for a neutral third party to adjudicate any disputes..

14 Fourth, the generic objection that the Settlement does not provide clear rules for the
15 Claims Program lacks merit. (Dkt. No. 48 at 3-4.) This objection is unsupported by the facts, as
16 the terms of the monetary and voucher relief are detailed at length in the Settlement Agreement,
17 which grants relief according to whether the Class Member has proof of purchase and their
18 claimed damages. (*Id.*) In fact, the Claims Process is transparent and fair, ensuring that Class
19 Members will be treated fairly, reasonably, and adequately. It demands accountability and
20 provides clear rules for awarding compensation, including: (1) requiring Crayola to provide
21 confirmatory discovery to Plaintiffs on a quarterly basis to ensure the process is proceeding
22 smoothly; and (2) enabling Class Members or the Parties to seek involvement of a third party to
23 resolve any disputes that arise throughout the claims process. (*Id.* at 2.)

25 Fifth and last, there is also no basis for the objection that attorneys’ fees are excessive.
26 (Dkt. No. 48 at 4-5.) As Plaintiffs established in the District Court, the fees sought are supported

1 by Ninth Circuit precedent, and are eminently reasonable given the fact that, within months of
 2 filing, consumers are being offered money back, compensation for damage to property, and an
 3 improved product with improved labeling and advertising. (Dkt. No. 48 at 5.)

4 At the final approval hearing for the Settlement, the Court waited to hear from Objector
 5 Pederson or any other objector before it commenced proceedings; however, no one appeared.
 6 (Sarko Decl. at ¶ 4.) Although Objector Pederson failed to present her objections in person at the
 7 final approval hearing, her written objection was filed with the Court. (*Id.*; *see also* Dkt. No.
 8 47.) The Court considered her objection and the Parties' submissions in deciding whether to
 9 grant final approval. (*See* Final Order, Dkt. No. 51 at 4 ("The Court . . . considered all matters
 10 and papers submitted to it in connection with the Final Approval Hearing and otherwise being
 11 fully informed, concludes that substantial and sufficient grounds exist to enter this Final Order
 12 and the Judgment.")) After reviewing all these materials, the Court approved the Settlement over
 13 Objector Pederson's objections. (*Id.*) The Court's written Order noted that the Settlement is, "in
 14 all respects, fair, reasonable and adequate and in the best interests of the Class within the
 15 meaning of Rule 23 of the Federal Rules of Civil Procedure." (*Id.* at 5.)

16 To protect the interests of the Class and to secure the payment of the Parties' appellate
 17 costs, Mr. Bandas and Objector Pederson should be required to post a bond. *See Skolnick v.*
 18 *Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (upholding imposition of appeal bond under Rule 7
 19 based on possibility that appeal was frivolous).

20 **B. The appeal is vexatious.**

21 In addition to being meritless, the appeal is vexatious and harmful to the interests of the
 22 Class. Although the objection and appeal were filed *pro se*, in reality, Objector Pederson is
 23 represented by Mr. Bandas, an attorney of the Bandas Law Firm in Corpus Christi, Texas. (*See*
 24
 25
 26

1 Sarko Decl. at ¶ 7.) Mr. Bandas is well known in courts across the country as a “professional” or
 2 “serial” objector. *See, e.g.*, (Sarko Decl. at ¶ 8, Ex. 3); *In re Cathode Ray Tube (CRT) Antitrust*
 3 *Litig.*, No. 07-5944, 2012 WL 1319881, at *2 (N.D. Cal. April 16, 2012) (Mr. Bandas is a
 4 “‘professional’ or ‘serial’ objector” who “‘routinely represents objectors purporting to challenge
 5 class action settlements, and does not do so to effectuate changes to settlements, but does so for
 6 his own personal financial gain . . .”).

8 Nor is this the first time that one of his clients has filed a purportedly *pro se* objection or
 9 appeal, only for Mr. Bandas’s representation of the objector/appellant to emerge. (*See* Sarko
 10 Decl. at ¶ 8, Ex. 3); *see also In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2012 WL 1319881,
 11 at *2 (although the objector’s papers did not list counsel, his objection was postmarked from the
 12 town in which Bandas worked and court documents illustrated that Bandas had assisted the
 13 objector in other proceedings). In fact, Mr. Bandas’s usual practice is to file frivolous,
 14 boilerplate appeals, and then, upon payment, to dismiss them without generating any substantive
 15 change in the settlement. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2012 WL 1319881, at
 16 *2; *In re Wal-Mart Wage & Hour Employment Practices Litig.*, MDL No. 1735, No. 06-00225,
 17 2010 WL 786513, at *1 (D. Nev. Mar. 8, 2010) (noting that Bandas has a “documented history
 18 of filing notices of appeal from orders approving other class action settlements, and thereafter
 19 dismissing said appeals when [he] and [his] client[] were compensated by the settling class or
 20 counsel for the settling class”). The objective of this procedure is simply to hold the Class
 21 Settlement hostage so that Mr. Bandas can extract his own personal benefit. *Id.*

24 Mr. Bandas has been censured by courts nationwide for these tactics. *See, e.g., In re*
 25 *Cathode Ray Tube (CRT) Antitrust Litig.*, 2012 WL 1319881 at *2-*3; *In re Wal-Mart Wage &*
 26 *Hour Employment Practices Litig.*, 2010 WL 786513 at *1-*2. Attached as Exhibit 3 to the

1 Declaration of Lynn Lincoln Sarko is a chart that plaintiffs' counsel filed in *In re Cathode Ray*
 2 *Tube (CRT) Antitrust Litig.*, No. 07-5944, Dkt. No. 51 (N.D. Cal. Mar. 15, 2012) to illustrate the
 3 numerous objections and appeals that Mr. Bandas has filed to class action settlements, and the
 4 corresponding reprimands that he has received. (Sarko Decl. at ¶ 8, Ex. 3.) As illustrated in the
 5 chart, Mr. Bandas has been excoriated by courts for "hijacking" settlements from deserving class
 6 members and hard-working class counsel, failing to adhere to his Rule 11 obligations, filing
 7 patently frivolous and cookie-cutter objections, and engaging in "extortion." (*Id.*)

9 Federal courts have grown "increasingly weary of professional objectors" such as Mr.
 10 Bandas, *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D 266, 295 n.26 (E.D. Pa. 2003),
 11 because they are "a pariah to the functionality of class action lawsuits, as they maraud proposed
 12 settlements—not to assess the merits on some principled basis—but in order to extort the parties,
 13 and particularly the settling defendants, into ransoming a settlement that could otherwise be
 14 undermined by a time-consuming appeals process." *Snell v. Allianz Life Ins. Co. of N. Am.*, No.
 15 97-2784, 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000). Professional objectors cause real
 16 harm to the Class, because payments from the settlement fund are delayed until the appeals are
 17 resolved. As an Ohio district court noted:

19 [C]lass actions . . . attract those in the legal profession who subsist primarily off
 20 of the skill and labor of, to say nothing of the risk borne by, more capable
 21 attorneys. These are the opportunistic objectors. Although they contribute
 22 nothing to the class, they object to the settlement, thereby obstructing payment to
 23 the class in the hope that lead plaintiff will pay them to go away. Unfortunately,
 the class-action kingdom has seen a Malthusian explosion of these opportunistic
 objectors

24 *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 754 (S.D. Ohio 2008).

25 To prevent abuse of appellate and class action procedure, the Parties jointly request that
 26 this Court order Mr. Bandas and Objector Pederson to post an appeals bond in accordance with

1 Federal Rule of Appellate Procedure 7. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 728 F.
 2 Supp. 2d 289, 294-95 (S.D.N.Y. 2010) (professional objectors' status taken into account in
 3 determining that appeal was vexatious and in bad faith, and thus appeals bond was warranted).

4 **C. Objector Pederson and her counsel have the financial ability to post bond.**

5 Unless an appellant demonstrates otherwise, she or he is presumed to be financially able
 6 to post an appeals bond. *See In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 293.
 7 Accordingly, Objector Pederson is presumed to be able to post an appeal bond in this matter.
 8 More fundamentally, since she is represented by an attorney who frequently files and objects in
 9 class actions, the appeal bond requirement should be an expected and reasonable expense.
 10

11 **D. There is a risk Objector Pederson and her counsel will not pay costs if they lose on**
 12 **appeal.**

13 The Parties face a significant risk that Appellant will never pay appellate costs absent a
 14 bond. Objector Pederson and her counsel are located in Corpus Christi, Texas. In the likely
 15 event that Objector Pederson loses her appeal, Plaintiffs and Defendant will need to institute a
 16 collection action in another jurisdiction in order to recover their costs. Consequently, the Parties
 17 face a high risk of non-payment. *See In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210,
 18 213 (S.D.N.Y. 2010); *see also In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL
 19 1409, 2010 WL 1253741, at *2 (S.D.N.Y. Mar. 5, 2010) (same). Moreover, Objector Pederson
 20 has not offered to guarantee payment of costs that might be assessed against her. *In re Initial*
 21 *Pub. Offering Sec. Litig.*, 728 F. Supp. 2d at 293.
 22

23 Requiring Objector Pederson and her counsel to post an appeals bond is particularly
 24 necessary because her counsel has previously flouted court orders regarding appeals bonds. In *In*
 25 *re Wal-Mart Wage and Hour Employment Practices Litig.*, MDL No. 1735, No. 06-00225, 2010
 26 WL 2132094, *1-*2 (D. Nev. May 25, 2010), Judge Pro in the District of Nevada sanctioned Mr.

1 Bandas and his objector-client for failing to comply with the court's order to post an appeals
 2 bond of \$500,000. *Id.* The court had ordered the appeal bond due to the "frivolous" nature of
 3 the appeal, which was "tantamount to a stay of the Judgment entered by [the] Court on
 4 November 2, 2009 approving the comprehensive class settlement in this case which provides fair
 5 compensation to millions of class members, as well as injunctive relief ensuring against further
 6 loss to persons similarly situated." *In re Wal-Mart Wage & Hour Employment Practices Litig.*,
 7 2010 WL 786513, at *2. According to the order imposing sanctions, Mr. Bandas and his client
 8 were jointly and severally required to "pay to the Plaintiffs' Settlement Fund the sum of \$200 per
 9 day for each of the intervening days between March 30, 2010 and May 18, 2010, or a total of
 10 \$10,000" as a sanction "for their failure to comply with this Court's Order of March 8, 2010
 11 requiring them to post an appeal bond." *In re Wal-Mart Wage & Hour Employment Practices*
 12 *Litig.*, 2010 WL 2132094, at *1. Mr. Bandas and Objector Pederson should be required to post a
 13 bond in this case because there is a likelihood that Mr. Bandas will repeat history by flouting
 14 court rules and failing to pay appellate costs when Objector Pederson's appeal fails.

17 **E. Requiring a bond is consistent with the Court's position as fiduciary for the Class.**

18 The Court is a fiduciary for the Settlement Class. *In re Mercury Interactive Corp. Sec.*
 19 *Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *see also Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d
 20 1299, 1301 (W.D. Wash. 2001) (Coughenour, J.), *aff'd*, 290 F.3d 1043 (9th Cir. 2002). Here, as
 21 noted above, there is considerable evidence that Objector Pederson and her attorney Mr. Bandas
 22 are not acting in the best interests of the Class. The Settlement in this case was reached
 23 expeditiously, resulting in not only generous compensation and voucher relief to Class Members,
 24 but also the reformulation and relabeling of the product at issue. In short, the Settlement
 25 provides comprehensive benefits and was approved in an admirable timeframe. In requiring an
 26

1 appeal bond, the Court would be protecting the interest of the Settlement Class in a speedy
 2 recovery and ensuring that Objector Pederson and her attorney are appealing in good faith.

3 **F. The amount of the bond is reasonable.**

4 Courts recognize that if a bond is too small, or if no bond is required, it “may encourage
 5 frivolous, time-consuming, harassing appeals.” *Page v. A.H. Robins Co.*, 85 F.R.D. 139, 140
 6 (E.D. Va. 1980). The bond amount requested by the Parties in the instant case is wholly
 7 reasonable and will further the goal of preventing a frivolous and time-consuming appeal in this
 8 case. Class Counsel and the Settlement Class seek a bond in the amount of \$20,000 to secure
 9 appellate costs permitted under the Rules. *See* Fed. R. App. 39(e), Adv. Comm. Note (“The costs
 10 described in this subdivision are costs of the appeal and, as such, are within the undertaking of
 11 the appeal bond.”).

12
 13 The amount requested is well within the range of bonds that have been ordered in other
 14 appellate cases, and below the amount that Mr. Bandas has been ordered to pay for similar
 15 appeals. *See, e.g., In re Wal-Mart Wage & Hour Employment Practices Litig.*, 2010 WL
 16 786513, at *2 (requiring Mr. Bandas and his objector-client to post a \$500,000 appeal bond
 17 under Fed. R. App. 7); (Sarko Decl. ¶ 9, Ex. 4 (*Conroy v. 3M Corp.*, No. 00-02810 (N.D. Cal.
 18 August 10, 2006), Dkt. No. 265 (Order granting motion to require objectors and the Bandas Law
 19 Firm jointly and severally to post an appeal bond of \$431,167.00)); *see also In re Currency*
 20 *Conversion Fee Antitrust Litig.*, 2010 WL 1253471, at *3 (finding \$16,000 too low for an
 21 appellate bond and ordering the posting of a \$50,000 bond); *In re Wells Fargo Loan Processor*
 22 *Overtime Pay Litig.*, MDL C-07-1841 EMC, 2011 WL 3352460 (N.D. Cal. Aug. 2, 2011) at *12
 23 (requiring objector to post a \$20,000 appeal bond if she filed an appeal of class settlement).
 24
 25 Accordingly, the request for an appeals bond of \$20,000 should be granted.
 26

III. CONCLUSION

For the reasons set forth herein, the Parties request that Objector Pederson and her counsel, Mr. Bandas, be required to post an appeals bond of \$20,000—or such other amount that the Court deems appropriate—under Federal Rule of Appellate Procedure 7. The Parties further suggest that a hearing on this motion will help the Court assess its merit and respectfully request the motion be set on the Court’s oral argument calendar.

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CERTIFICATE OF SERVICE

I certify that on June 21, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

I also certify that I on June 21, 2012, I caused a true and correct copy of the foregoing to be sent via overnight delivery to the following:

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DATED this 21st day of June, 2012.

KELLER ROHRBACK L.L.P.

By /s/ Harry Williams IV

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